APPENDIX A

IN THE
SUPREME COURT OF THE STATE OF NEW MEXICO

RAYMOND BURNS,
*Plaintiff-Appellant,*

vs. No. 8453

STATE OF NEW MEXICO, BUREAU OF REVENUE, INCOME TAX DIVISION, VICENTE OJINAGA, ACTING DIRECTOR.
*Defendants-Appellees.*

CONSOLIDATED FOR PURPOSES OF APPEAL

JAMES B. HERT,
*Plaintiff-Appellant,*

vs. No. 8454

STATE OF NEW MEXICO, BUREAU OF REVENUE, INCOME TAX DIVISION, HOWARD DOWNEY, ACTING DIRECTOR.
*Defendants-Appellees.*

OPINION

CARMODY, Justice.

Two separate actions were brought by residents of Texas, challenging the jurisdiction of the State to levy an income tax on wages paid to civilian personnel employed by the federal government at White Sands Missile Range in New Mexico. The trial court rendered judgment in favor of the State in both cases and, on

appeal, the cases were consolidated for the purpose of decision.

The appeal presents two questions: (1) Whether the State of New Mexico has taxing jurisdiction over the federal area involved, and (2) whether the state income tax law is in violation of the New Mexico constitution as exceeding constitutional limitations.

On February 12, 1941, the New Mexico legislature coded jurisdiction to the United States of the property here involved, reserving only the right to serve civil and criminal process (Ch. 8, 1941 Sess. Laws). Prior to the cession of jurisdiction, on October 9, 1940, the Congress passed what is termed as the "Buck Act" (4 U.S.C. §§ 104-110). Appellants argue that the Buck Act does not apply to them, because the legislature did not reserve taxing jurisdiction. The Buck Act provides:

> "(a) No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.
>
> "(b) The provisions of subsection (a) shall be applicable only with respect to income or receipts received after December 31, 1940." (4 U.S.C. § 106)

Appellants attribute to the legislature an awareness of the Buck Act's effect, urging that the intentional cession of exclusive jurisdiction, except for service of process, was an express rejection of taxing jurisdiction.

Opposed to the appellants' position, appellees reason that the Buck Act had prospective effect and applies

equally to cessions made before and after its passage. In this connection, it is urged that for the New Mexico legislature to expressly reserve taxing jurisdiction would have been an idle gesture, because §110 (e) by its very definition gives states taxing jurisdiction in *all* federal areas, whether reserved or not.

> (e) The term 'Federal Area' means any lands or premises held or acquired by or for the use of the United States or any department, establishment, or agency, of the United States; and any Federal area, or any part thereof, which is located within the exterior boundaries of any State, shall be deemed to be a Federal area located within such State."

There is no question but that cession of jurisdiction to the United States deprives a state of jurisdiction in the absence of special federal legislation. Standard Oil Co. v. California (1934), 291 U.S. 242, 54 S.Ct. 381, 78 L.Ed. 775; International Business Machines Corporation v. Vaughn (Fla. 1957), 98 So.2d 747, Arlington Hotel Co. v. Fant, 1929, 278 U.S. 439, 49 S.Ct. 227, 73 L.Ed. 447; Howard v. Commissioners, 1953, 344 U.S. 624, 73 S.Ct. 465, 97 L.Ed. 617; Humble Pipe Line Co. v. Waggonner, 1964, 376 U.S. 369, 84 S.Ct. 857, 11 L.Ed. 2d 782. However, when special legislation exists, as it does here, it appears to us that the opposite conclusion is inescapable. The question, therefore, becomes whether the Buck Act is self-executing, applicable in the instant case in spite of the fact that the cession took place after the passage of the federal act. Although there are no decisions of this court directly in point, at least two are persuasive and shed some light on the question.

In Arledge v. Mabry, 1948, 52 N.M. 303, 197 P.2d 884, the court was concerned with voter qualifications at Los Alamos, New Mexico. It was there held that because

of the vesting of exclusive jurisdiction in the federal government, Los Alamos was, in effect, not in New Mexico, and that therefore residents of Los Alamos did not come within the qualifications required of voters. In the course of the opinion, the effect of certain state taxes being levied against Los Alamos residents and its bearing on jurisdiction was considered. The opinion acknowledged the Buck Act as authorizing the levy of these taxes, although recognizing that only through a recession of jurisdiction could such power exist in the State. This portion of the opinion is particularly persuasive in light of the fact that the condemnation proceedings whereby the part of Los Alamos, with which the court was concerned, was acquired by the federal government in 1943 — this, of course, was subsequent to the passage of the Buck Act.

In McKee v. Bureau of Revenue, 1957, 63 N.M. 185, 315 P.2d 832, it was urged that the State lacked authority to collect certain use taxes in spite of the existence of the Buck Act, thereby again raising the question of the taxing power of the State. In that case, we impliedly accepted the State's contention that the Buck Act was self-executing, requiring affirmative act of acceptance. Accord, State v. Pearson Construction Co., 1957, 236 Ind. 602, 141 N.E.2d 448. Ordinarily, it is true that cession and/or recession of jurisdiction by one sovereignty to another requires an acceptance to render it effective. Yellowstone Park Transportation Co. v. Gallatin Co. (9th Cir. 1929), 31 F.2d 644, cert. denied 280 U.S. 555, 50 S.Ct. 15, 74 L.Ed. 611; Silas Mason Co. v. Tax Comm'n, 1937, 302 U.S. 186, 58 S.Ct. 233, 82 L.Ed. 187; Kiker v. City of Philadelphia, 1943, 346 Pa. 624, 31 A.2d 289, cert. denied 320 U.S. 741, 64 S.Ct. 41, 88 L.Ed 439. Nevertheless, acceptance is presumed, absent the showing of a contrary intention, Silas Mason Co. v.

Tax Comm'n, supra; Kiker v. City of Philadelphia, supra. We certainly will not presume an intention on the part of the legislature to cede its taxing power in the absence of a clear showing to the contrary. See, McKee v. Bureau of Revenue, supra. In our view, the Buck Act must be accorded prospective operation; therefore, silence in the act ceding jurisdiction is not a clear indication of the intention to surrender the power to tax. It follows, therefore, that the State has jurisdiction to levy the tax in question against the appellants.

We now proceed to appellants' attack on the judgments on the constitutional basis. In essence, it is urged that the income tax levies a tax upon personal property within the meaning of art. VIII, § 2, of the New Mexico constitution and is in excess of the rates allowed therein. The section provides as follows:

> "Taxes levied upon real or personal property for state revenue shall not exceed four mills annually on each dollar of the assessed valuation thereof except for the support of the educational, penal and charitable institutions of the state, payment of the state debt and interest thereon; and the total annual tax levy upon such property for all state purposes exclusive of necessary levies for the state debt shall not exceed ten mills; Provided, however, that taxes levied upon real or personal tangible property for all purposes, except special levies on specific classes of property and except necessary levies for public debt, shall not exceed twenty mills annually on each dollar of the assessed valuation thereof, but laws may be passed authorizing additional taxes to be levied outside of such limitation when approved by at least a majority of the electors of the taxing district voting on such proposition."

The whole argument is whether or not income is property, in the sense above used. In this connection, there is no question but that the power to tax is in-

herent and may be exercised "without let or hindrance, except in so far as limited by the Constitution." See, Lujan v. Triangle Oil Co., 1934, 38 N.M. 543, 37 P.2d 797; and Asplund v. Alarid, 1923, 29 N.M. 129, 219 Pac. 786.

We have not before had occasion to directly consider the problem involved, although in State v. Gomez, 1929, 34 N.M. 250, 280 Pac. 251, we held that a succession or inheritance tax "is not a tax upon tangible property" and that its imposition did not violate art. VIII, § 1. Also, in Flynn, Welch & Yates v. State Tax Commission, 1934, 38 N.M. 131, 28 P.2d 889, we, in effect, held that a severance tax was something else than a property tax or a tax "upon tangible property." Also, in State v. State Tax Commission, 1936, 40 N.M. 299, 58 P.2d 1204, although admittedly dictum, it was pointed out that an income tax is not a tax on tangible property.

In other jurisdictions where the question of classification of income as property has been considered, it has been raised in cases where the graduated income tax, in its entirety, has been attacked as unconstitutional. The question posed in these cases was whether the graduated income tax was consistent with constitutional uniformity clauses. The results of the various opinions disclose a sharp split in authority of which the following are illustrative. Graduated income taxes have been held unconstitutional and income defined as property in the following cases: See e.g., Eliasberg Bros. Mercantile Co. v. Grimes, 1920, 204 Ala. 492, 86 So. 56, 11 A.L.R. 300; Bachrach v. Nelson, 1932, 349 Ill. 579, 182 N.E. 909; Culliton v. Chase, 1933, 174 Wash. 363, 25 P.2d 81. In other jurisdictions, it has been determined that the uniformity clauses were inapplicable and that income was not property. See, e.g., Ludlow-

Saylor Wire Co. v. Wollbrinck, 1918, 275 Mo. 339, 205 S.W. 196; Featherstone v. Norman, 1930, 170 Ga. 370, 153 S.E. 58, 70 A.L.R. 449, Stanley v. Gates, 1929, 179 Ark. 886, 19 S.W.2d 1000; O'Connell v. State Board of Equalization, 1933, 95 Mont. 91, 25 P.2d 114; Diefendorf v. Gallet, 1932, 51 Idaho 619, 10 P.2d 307. Thus the above cases cannot be considered as directly in point with the issue before us, but they are instructive as to the nature of "income" as property.

The cases cited above from Montana and Idaho are particularly persuasive, because the uniformity clauses there involved are comparable to ours, even though we are not concerned with the uniformity clause per se. In Diefendorf, it was determined that an income tax was not a tax on property but rather an excise tax. We specifically acknowledge the fact that Idaho had an unusual constitutional provision, leaving the definition of "property" to statutory interpretation, but nevertheless the decision itself represents an excellent survey of the many decisions on the question and contains a well-reasoned conclusion. The Supreme Court of Montana, in O'Connell, also concluded that income was not property. The court did not determine whether it was an excise tax or not, but said "there are reasons why such a tax might be classed as a property tax, and reasons why it should be classed as an excise. Volumes, in fact libraries, have been written in a vain endeavor to accurately classify the income tax." The court concluded that the legislature intended to adopt an income tax and did not intend that it should be considered as a property tax. We likewise decline to state the exact nature of the tax, but take note of the fact that it has been referred to as a "nonproperty" tax. See, Newhouse, Constitutional Uniformity and Equality in State Taxation, particularly discussion commencing page

689. In this connection, the following quotation from Flynn, Welch & Yates v. State Tax Commission, supra, is pertinent:

> "It is not for the state to fit this tax into some existing and known mould of excise taxation, or fail; it is for appellee [appellants here] to demonstrate it to be a tax on tangible property, or fail."

Appellants strongly rely on Bachrach v. Nelson, supra, and Culliton v. Chase, supra, but we are unable to agree with the reasoning or the result of these decisions. In particular, appellants seem to derive considerable satisfaction from the statement from Culliton to the effect that the overwhelming weight of authority is in accordance with the Washington decision. We do not believe it is the overwhelming weight of the authority. See, Newhouse, supra, and Annots., 11 A.L.R. 313, 70 A.L.R. 468, 97 A.L.F. 1488. In any event, the cases really are not in point with respect to the problem before us. We would, however, note that the Washington constitution contains what that court termed a "peculiarly forceful constitutional definition," stating that property includes everything capable of ownership, whether real or personal property, and whether tangible or intangible. From this, Washington held that income was necessarily intangible property. If New Mexico had a similar provision, we would probably agree.

Viewing the constitution of New Mexico, particularly when we consider certain amendments thereto, leads us to the conclusion that income is not property in the constitutional sense as used in art.

VIII. Originally, art. VIII, § 1, read:

> "The rates of taxation shall be equal and uniform upon all subjects of taxation.

In 1914; this article was amended to read:

> "Taxes levied upon tangible property shall be in proportion to the value thereof, and taxes shall be equal and uniform upon subjects of taxation in the same class."

It appears to us that the prior limitation on the power of the legislature to act was, by the amendment, relaxed to the extent that uniformity was required only upon subjects of taxation in the same class. It is important to note the phraseology used in the amendment with respect to "tangible property." To us, it is quite apparent that the utilization of the word "tangible" in § 1 was intentional, thereby distinguishing such property from "intangible property." Similarly, it should be noted that that portion of are. VIII, § 2, supra, containing the proviso, refers only to "real or personal tangible property." We would further take note of the fact that in November of 1967, the voters of New Mexico adopted a further amendment to art. VIII, § 2, and although the amendment has no bearing upon the issue before us, the language rfeerred to above was adopted without change.

In our opinion, the income tax in question is not levied real or personal property as these words are used in art. VIII, § 2, of the New Mexico constitution.

The judgments should be affirmed. IT IS SO ORDERED.

s/ David W. Carmody
Justice

WE CONCUR:

s/ David Chavez, Jr. C.J.
s/ M. E. Noble J.
s/ Irwin S. Moise J.
s/ J. C. Compton J.

**APPENDIX B**

STATE OF NEW MEXICO COUNTY OF SANTA FE

IN THE DISTRICT COURT

NUMBER 35932

RAYMOND BURNS,

*Plaintiff;*

VS.

STATE OF NEW MEXICO,
BUREAU OF REVENUE,
INCOME TAX DIVISION,
VICENTE OJINAGA,
Acting Director.

*Defendant.*

PLAINTIFF'S ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now RAYMOND BURNS, Hereinafter called Plaintiff, complaining of State of New Mexico, Bureau of Revenue, Income Tax Division, Vicente Ojinaga, Acting Director, hereinafter styled Defendant, and for grounds of complaint and cause of action, will respectfully show the Court:

1.

Plaintiff resides in El Paso County, Texas, and was a resident of El Paso County, Texas, at all times material hereto. During the year of 1964, Plaintiff was employed by the United States Government at White Sands Missile Range, Dona Ana and Otero Counties, New Mexico, a federal area under exclusive jurisdiction of the federal government. Plaintiff is so employed at this time, and brings this suit for himself individually and on behalf of all other persons who reside in El Paso County, Texas, and who resided in said county and state during 1964, and were employed by the United States government on said White Sands Missile Range, New Mexico.

2.

Plaintiff will show the Court that on April 17, 1964, the Secretary of The Treasury of The United States, purporting to act under the provisions of Section 84-B, U.S.C. as amended September 23, 1959, entered into agreement with the Bureau of Revenue of New Mexico and with the State of New Mexico, that beginning no later than May 31, 1964, income taxes claimed by New Mexico to be due to that state by non-residents of New Mexico because of their employment by the government of the United States at and on White Sands Missile Range, a federal area in said State of New Mexico, would be withheld from the pay due to such non-residents for each pay period.

3.

Purusant to the foregoing action of the Secretary of the Treasury the Department of the Army, on or about May 12, 1964, issued a directive to the effect that beginning no later than the pay period of May 31, 1964, New Mexico State income tax deductions would be withheld from paychecks of all civil service employees at White Sands Missile Range, including non-residents of New Mexico employed by the government at White Sands Missile Range.

4.

On May 13, 1964, the Commanding General at White Sands Missile Range, New Mexico, caused to be posted on all Bulletin Boards at White Sands Missile Range, the following:

White Sands Missile Range, New Mexico
12 May 1964

WSMR EMPLOYEES
TO PAY
NEW MEXICO STATE INCOME TAX

New Mexico State income tax deductions will be withheld from paychecks of all White Sands Mis-

sile Range civil service employees effective with the pay period starting on 31 May, 1964.

The new directive, received from Department of Army yesterday, specifies: "each employer in New Mexico will withhold New Mexico income tax from the compensation of employees of the United States who are subject to the tax and who are regularly employed in New Mexico, whether they are residents or non-residents."

The state tax is currently being deducted from the paychecks of WSMR workers who reside in New Mexico. Therefore this new ruling includes those employees *not* residing in New Mexico.

Rate of deduction will be approximately 7% of the dollar amount now being withheld for Federal income tax.

Military personnel will not be affected by this ruling.

FOR THE COMMANDER:

(Signed) M. E. Schulten
M. E. Schulten
Lt. Col. WAC;
For The Commander.

Distribution:
All Bulletin Boards
Remove after 30 June

5.

Plaintiff alleges that on each pay day at White Sands Missile Range, New Mexico, beginning May 31, 1964, and continuing to the date of filing of this petition, the United States government, acting through and by its officers, agents and employees at White Sands Missile Range, New Mexico, withheld from the earnings of Plaintiff and those on whose behalf this action is brought, certain sums of money alleged to be income tax due to the State of New Mexico by Plaintiff and those in whose behalf this action is brought; that during the months of July, 1964, October, 1964, and January, 1965, the agents, officers and employees of the

United States government at White Sands Missile Range, New Mexico, who had withheld such sums of money from Plaintiff's earnings and the earnings of those on whose behalf this action is brought, remitted the same to the Bureau of Revenue of the State of New Mexico, and said Bureau of Revenue, Income Tax Division, Vicente Ojinaga, Acting Director, in turn transmitted such money so withheld from the pay of Plaintiff and those on whose behalf this action is brought, to the State Treasury of the State of New Mexico.

6.

Plaintiff will show the Court that the United States government acting by its agents, officers and employees at White Sands Missile Range, New Mexico, will continue to withhold from the earnings of Plaintiff and those on whose behalf without constitutional and statutory for the following reasons, towit:

(a)

The Legislature of New Mexico had no constitutional authority to enact the graduated income tax law by which New Mexico collects and attempts to collect an income tax from Plaintiff and from those on whose behalf this action is brought, based on their earnings as employees of the federal government at White Sands Missile Range, New Mexico.

(b)

The State of New Mexico has no jurisdiction over the federal area in Dona Ana and Otero Counties, New Mexico, known as White Sands Missile Range, to levy and collect income taxes from persons employed by the federal government in that area.

(c)

The New Mexico Income Tax Act is administered in a way that discriminates against both resident and non resident civilian employees of the federal government

at White Sands Missile Range, in that military personnel working in that area side by side with civilian personnel, are not required to pay New Mexico Income taxes.

(d)

Two provisions of the New Mexico Income Tax Act, to-wit: Article 15, Sections 72-15-1 and Article 15, Sections 72-15-1.1, New Mexico Statutes annotated, 1953 Compilation, are so patently irreconciliable that both provisions are invalid and unenforceable, Section 72-15-1 providing that married persons who file federal income tax returns showing *a net income of $1,500.00 or less* shall not be assessed any income taxes while Section 72-15-1.1 declares it to be the purpose of this ACT (Sections 72-15-1 & 72-15-1.1) that married persons who have one or more dependents and who have net income of *LESS than $1,500.00* shall pay no income taxes. The two provisions are so conflicting and irreconciliable that the purpose of the Legislature cannot be determined.

(e)

The income tax form 151-A-IT, Non-Resident Income Tax Return, copy of which is attached hereto and made a part hereof, devised and prepared by the Bureau of Revenue of New Mexico, is so different from the Resident Income Tax Return form 101-IT, that non-residents required to file an income tax return to the State of New Mexico, are discriminated against in the following respects:

1.

Non-residents of New Mexico having income received from services performed or from business in New Mexico, are required to file their income tax returns on forms which require the disclosure of such persons' income from every source and for specific items listed

thereon, not only from New Mexico but from anywhere in the world, while residents of New Mexico are required to disclose nothing more on Form 101-IT, than their total taxable income as shown on Form 1040, U. S. Individual Income Tax Return; that there is no constitutional or statutory authority giving the Bureau of Revenue the power to devise and prepare such forms.

2.

Said Non-Resident Income Tax Form 151-A-IT is further discriminatory in that nowhere on said form is the non-resident who completes it, told that if he is a married person and filed a joint federal return showing a net taxable income of $1,500.00 or less he owes no state income tax, while the married resident of New Mexico who is presumed to know the law of his state, is advised at Line 10 of Resident Income Tax form 101-IT that if he is married and filed a federal income tax return showing a net taxable income of $1,500.00 or less he owes no income tax to New Mexico. Plaintiff alleges that this discrimination by the Bureau of Revenue is in violation of Section 2 of Article IV of the Constitution of the United States and of Section One (1) of the Fourteenth Amendment to the Constitution of the United States.

3.

Said income tax forms so devised and prepared by the Bureau of Revenue for both residents and non-residents cannot be completed in an intelligent manner and be correct for the reason that if the form shows a net taxable income of $1,500.00 in the case of a married person filing a federal income tax form 1040 such person will owe no state income tax under the provisions of Article 15, Section 72-15-1, New Mexico Income Tax Act, but under the provisions of Article 15, Section 72-15-1.1 he would owe income tax on $1,500.00 because

his return shows a taxable income which is NOT LESS than $1,500.00. If Plaintiff and those on whose behalf this suit is brought, be compelled to file income tax returns to the Bureau of Revenue on Non-Resident Income Tax forms so prepared by the Bureau of Revenue of New Mexico, and pay income taxes based on such return, they will be deprived of their property without due process of law in violation of Section One (1) of the Fourteenth Amendment to the Constitution of the United States.

(f)

The action of the Bureau of Revenue of New Mexico, in devising and preparing Schedule "A" Computation of Net Income, on Non-Resident Income Tax Return form 151-A-IT was arbitrary and without authority ol law; that said Bureau of Revenue devised said Schedule "A" so as to deprive non-residents of New Mexico having income from services performed in New Mexico or from business conducted in that state, of any deductions from their base income as that term is defined in Article 15, Section 72-15-6 New Mexico Statutes Annotated, 1953, Compilation, for 1964, or any years since June 29, 1961, so as to arrive at the true net taxable income for the year of 1964, and subsequent years, which action of the Bureau of Revenue is in violation of Section 1, of the Fourteenth Amendment of the Constitution of the United States and contrary to the provision of Section "B", subsections 1 and 4, of Article 15, Section 72-15-6 of New Mexico Statutes, 1953, Compilation.

WHEREFORE, premises considered, Plaintiff prays on behalf of himself and those on whose behalf this action is brought, that the Court in the exercise of its powers in equity, order the said Vicente Ojinaga, Acting Director of Income Tax Division, Bureau of Reve-

nue, State of New Mexico, to appear at such time and place as the Court may designate, to show cause, if any he may have why he should not be ordered to place in the Income Tax Suspense Fund, and leave there pending final judgment in this cause, all monies he may receive from the United States Government finance office at White Sands Missile Range, New Mexico, which monies will be deducted and withheld by said finance office from the earnings and pay due to the Plaintiff and those on whose behalf this action is brought, as alleged income taxes due or that may become due to the State of New Mexico, which monies will be forwarded to Bureau of Revenue, Income Tax Division, of the State of New Mexico by said Finance Office of the United States government, Department of The Army, White Sands Missile Range, New Mexico, at intervals of three months, April, July, October and January, while this cause is pending.

Plaintiff further prays that the said Vicente Ojinaga, Acting Director of the Income Tax Division, Bureau of Revenue, be cited to appear and answer herein and that upon final hearing hereon, Plaintiff, and those on whose behalf this action is brought, have judgment of the Court that: (a) The New Mexico Income Tax laws are unconstitutional and unenforceable; (b) New Mexice has no jurisdiction over the federal area in New Mexico known as White Sands Missile Range, to levy and collect an income tax from non-residents employed by the United States government in that area; (c) New Mexico discriminates against civilians employed by the government on said federal area in its failure to levy and assess an income tax against the earnings of military personnel performing services and being paid for such services within such federal area; (d) Sections 72-15-1 and 72-16-1.1 of Article 15, New Mexico Statutes

Annotated, 1953 Compilation, are void and of no effect because they conflict with each other and are irreconciliable; Income Tax form 151-A-IT devised and prepared by the Bureau of Revenue for use by non-residents of the State in filing their income tax returns to New Mexico, discriminates against such non-residents as are compelled to use such forms, and by so devising said non-resident income tax forms the State of New Mexico, acting by and through the Income Tax Division of Bureau of Revenue, attempts to deprive non-residents of New Mexico, who have income from services performed in or from business conducted in New Mexico, of their property without due process of law and in violation of Section 2, of Article IV of the Constitution of the United States and of Section 1, Fourteenth Amendment to the Constitution of the United States; theree is no statutory authority for the Bureau of Revenue to devise and prepare said forms; for judgment for the amount of money so remitted to the Bureau of Revenue by the Finance Office as income taxes withheld from Plaintiff and those on whose behalf this action is brought, from the date of the filing of this action until date of judgment and for an order requiring the Income Tax Division of Bureau of Revenue of New Mexico to pay to Plaintiff and those on whose behalf this action is brought, the amount of money so remitted to said Income Tax Division by said Finance Office of the United States government, Department of The Army, at White Sands Missile Range, New Mexico, and for such other orders as are just and proper.

Hubert T. Faulk
El Paso, Texas
Holvey Williams
El Paso, Texas
Julian Horwitz
El Paso, Texas
Thomas B. Rapkoch
Las Cruces, New Mexico
*Attorneys for Plaintiff*

(CAPTION OMITTED)

## REQUESTED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff hereby respectfully requests the court to make the following Findings of Fact and Conclusions of Law:

*Findings of Fact*

1. The Findings of Fact (Nos. 1 through 11) requested by Defendants herein except that Howard Downing, instead of Vicente Ojinaga, is now the Acting Director of the Income Tax Division, Bureau of Revenue, State of New Mexico.

2. Beginning with the pay period of May 31, 1964 and continuing with each and every pay period since that time, the Finance Office of the Department of Army at White Sands Missile Range has not deducted and has not withheld from the pay due, military personnel any amount of money attributable to New Mexico income taxes imposed on such personnel and State of New Mexico acting through defendants has made no attempt to cause such finance office to make such deduction and withholding from the pay of such personnel.

*Conclusions of Law*

1. The New Mexico Legislature at all relevant times herein had no power or authority to enact a graduated income tax upon the income of plaintiff.

2. Section 72-15-6, N.M.S.A., 1953 Comp. is invalid and unconstitutional and does not provide a basis by which it is mathematically possible to determine either the federal income tax liability or the New Mexico income tax liability.

3. Section 72-15-51, N.M.S.A., 1953 Comp. is invalid and unconstitutional.

4. In enacting Section 72-15-51, *supra*, the Legis-

lature failed to establish sufficient definite standards to support its delegation of power to the Bureau of Revenue with respect to the administration of New Mexico income tax laws.

5. The exemption categories referred to in Section 72-15-51, *supra*, are not defined by reference to the Internal Revenue Code.

6. Exclusive jurisdiction over the White Sands Missile Range, except jurisdiction to serve civil and criminal process, was ceded by the State of New Mexico to the federal government before the State of New Mexico purported to levy any income tax on the income of plaintiff earned while employed at White Sands Missile Range.

7. The federal government has not ceded back to the State of New Mexico any part of the exclusive jurisdiction referred to in requested conclusion of law No. 6.

8. The State of New Mexico has no jurisdiction to tax the income of plaintiff earned while employed at White Sands Missile Range.

9. The State of New Mexico acting through defendants in the application, administration and enforcement of its income tax laws discriminating against plaintiff in favor of military personnel employed at White Sands Missile Range in violation of the 14th Amendment of the United States Constitution.

10. Plaintiff is not subject to New Mexico income tax on income earned at White Sands Missile Range.

11. Plaintiff is entitled to judgment against defendants for the amount of money withheld from plaintiff's income to date earned at White Sands Missile Range.

Respectfully submitted,
STEPHENSON, CAMPBELL & OLMSTED
By: James L. Holly, Jr.
*Co-attorneys for Plaintiff*

(CAPTION OMITTED)

JUDGMENT

This cause came on regularly for trial before the Court, and the issues having been duly tried, and the Court having made its findings of fact and conclusions of law, it is hereby

ORDERED, ADJUDGED AND DECREED: that plaintiff's complaint herein be dismissed on its merits.

Dated, March 15, 1967.

SAMUEL Z. MONTOYA
*District Judge*

Approved:
EDWARD R. PEARSON
Assistant Attorney General

Attorney for Defendants
Approved as to form:
STEPHENSON, CAMPBELL & OLMSTED
By James B. Alley, Jr.
Co-attorneys for Plaintiff

## APPENDIX C

STATE OF NEW MEXICO COUNTY OF SANTA FE

*IN THE DISTRICT COURT*

JAMES B. HERT,

*Plaintiff;*

vs.

STATE OF NEW MEXICO,
BUREAU OF REVENUE,
VICENTE OJINAGA,
Acting Director,
INCOME TAX DIVISION;

*Defendants.*

NUMBER 26132

PLAINTIFF'S FIRST AMENDED

*ORIGINAL PETITION*

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now JAMES B. HERT, Plaintiff in the above numbered and entitled cause, and with leave of the Court first had and obtained, files this, his First Amended Original Petition, complaining of STATE OF NEW MEXICO, BUREAU OF REVENUE, Income Tax Division of which VICENTE OJINAGA is Acting Director, hereinafter called Defendants, and for grounds of complaint and cause of action will respectfully show the Court:

1.

Plaintiff is a bona fide resident of El Paso County, Texas, and was such resident at all times material hereto.

2.

Plaintiff is employed and was employed during the months of January, February and March, 1965, by the federal government at White Sands Missile Range, a federal area in New Mexico.

3.

Plaintiff alleges that at the instance and request of the Defendants herein, and without lawful authority and without the consent of Plaintiff, the civilian Finance Office of the United States government at White Sands Missile Range, New Mexico, withheld from compensation due to Plaintiff for his services as an employee of said federal government during the months of January, February and March, 1965, the sum of $22.56, and thereafter, on or about April 15, 1965, said Finance Officer remitted said sum, without Plaintiff's consent, to the Bureau of Revenue, Income Tax Division, of the State of New Mexico, which said sum is now unlawfully withheld from the Plaintiff.

4.

Plaintiff alleges that on April 12, 1965, he filed with the Bureau of Revenue of New Mexico, Income Tax Division, Plaintiff's written protest of the payment of said sum of $22.56 or of any other amount alleged to be income taxes due to the State of New Mexico, and requested that said sum so unlawfully withheld from him and remitted to the Bureau of Revenue of New Mexico be held in the Income Tax Suspense Fund as provided by law, until Plaintiff's liability for said tax or any tax alleged to be due to New Mexico, has been judicially determined.

5.

Plaintiff says that he does not owe any amount of income taxes to the State of New Mexico for the months

of January, February and March, 1965, or for any other period of time; that the amount of $$22.56 withheld from compensation due to him by the federal government for his services as an employee of said federal government as hereinbefore set out, was unlawfully taken from him by an employee or agent of the federal government at White Sands Missile Range, New Mexico, at the instance and request of the Defendants herein, and said sum was unlawfully remitted by said Finance Office at White Sands Missile Range, New Mexico, to the Bureau of Revenue of New Mexico, Income Tax Division, and is being withheld unlawfully by said Bureau of Revenue, from Plaintiff, depriving him of his property and the use and enjoyment of same without due process of law and in violation of Section One of the Fourteenth Amendment to the Constitution of the United States.

6.

Plaintiff alleges and will show the Court that the acts of which he complains as being unlawful, are not lawful because:

(a)

Article 15, Section 72-15-1, New Mexico Statutes Annotated, 1963, compilation, which levies or purports to levy an income tax on a graduated scale as provided in Article 15, Section 72-15-21, New Mexico Statutes, 1953 Compilation, is unconstitutional in that the Constitution of the State of New Mexico does not give the Legislature of New Mexico power or authority to enact a graduated income tax law.

(b)

Section 72-15-6, Article 15, New Mexico Statutes Annotated, 1953, Compilation, is unconstitutional be-

cause it is vague, unintelligible, ambiguous, and renders mathematically impossible the filing of a correct income tax return to the State of New Mexico.

(c)

Section 72-15-51, New Mexico Statutes, 1953 Compilation, which purports to require employers to withhold certain amounts as income taxes due to New Mexico, from wages, salaries or compensation due to employees by employers, is unconstitutional because no income tax is due to the State of New Mexico until it has been levied and assessed and the law, Article 15, Section 72-15-21 provides that the tax shall be levied, collected and paid annually; that Plaintiff owes no income taxes because there has been no determination by an administrative agency of the State of New Mexico, based on an income tax return filed by the Plaintiff, that Plaintiff owes New Mexico any income taxes, and therefore, Defendants herein are withholding from Plaintiff his property, without due process of law in violation of Section 1, Fourteenth Amendment to the Constitution of the United States.

(d)

The State of New Mexico does not have jurisdiction over the federal area in New Mexico known as White Sands Missile Range, to levy and collect an income tax from Plaintiff.

WHEREFORE, Plaintiff prays that the Defendants be cited to appear and answer herein and that upon final hearing Plaintiff have judgment ordering the Defendants to return said sum of $22.56, together with

interest thereon, to Plaintiff, together with Plaintiff's costs in his behalf expended in this cause.

Hubert T. Faulk
325 W. Missouri Ave.
El Paso, Texas.

Thomas B. Rapkoch
Las Cruces, New Mexico

Counsel For Plaintiff

(CAPTION OMITTED)

## *REQUESTED FINDINGS OF FACT AND CONCLUSIONS OF LAW*

(Plaintiff) Defendant hereby respectfully requests the court to make the following Findings of Fact and Conclusions of Law:

### *Findings of Fact*

1. The Findings of Fact (Nos. 1 through 13) requested by defendants herein.

### *Conclusions of Law*

1. The New Mexico Legislature at all relevant times herein had no power or authority to enact a graduated income tax upon the income of plaintiff.

2. Section 72-15-6, N.M.S.A., 1953 Comp. is invalid and unconstitutional and does not provide a basis by which it is mathematically possible to determine either the federal income tax liability or the New Mexico income tax liability.

3. Section 72-15-51, N.M.S.A., 1953 Comp. is invalid and unconstitutional.

4. In enacting Section 72-15-51, *supra*, the Legislature failed to establish sufficient definite standards to

support its delegation of power to the Bureau of Revenue with respect to the administration of New Mexico income tax laws.

5. The exemption categories referred to in Section 72-15-51, *supra,* are not defined by reference to the Internal Revenue Code.

6. Exclusive jurisdiction over White Sands Missile Range, except jurisdiction to serve civil and criminal process, was ceded by the State of New Mexico to the federal government before the State of New Mexico purported to levy any income tax on the income of plaintiff earned while employed at White Sands Missile Range in the years 1961 through 1965.

7. The federal government has not ceded back to the State of New Mexico any part of the exclusive jurisdiction referred to in requested conclusion of law No. 6.

8. The State of New Mexico has no jurisdiction to tax the income of plaintiff earned while employed at White Sands Missile Range in the years 1961 through 1965.

9. Plaintiff is not subject to New Mexico income tax on income earned at White Sands Missile Range during the years 1961 through 1965.

10. Plaintiff is entitled to judgment against defendants in the amount of $22.56.

Respectfully submitted,

STEPHENSON, CAMPBELL & OLMSTED
By James B. Alley, Jr.
*Co-attorneys for Plaintiff*

(CAPTION OMITTED)

JUDGMENT

This cause came on regularly for trial before the Court, and the issues having been duly tried, and the Court having made its findings of fact and conclusions of law, it is hereby

ORDERED, ADJUDGED AND DECREED: that plaintiff's complaint herein be dismissed on its merits, and it is further

ORDERED, ADJUDGED AND DECREED:

1. That defendant, State of New Mexico, have judgment against plaintiff on its counterclaim;

2. That plaintiff file income tax returns with the State of New Mexico for the years 1961, 1962, 1963 and 1964:

3. That plaintiff pay his income tax liability to the State of New Mexico for the years 1961, 1962, 1963 and 1964 in the sum of $344.56, plus penalty in the sum of $34.46, plus interest thereon at the rate of one-half percent per month until paid.

Dated, March 15, 1967.

SAMUEL Z. MONTOYA
*District Judge*

Approved:
EDWARD R. PEARSON
Assistant Attorney General

Attorney for Defendants
Approved as to form:
STEPHENSON, CAMPBELL & OLMSTED
by James B. Alley, Jr.
Co-attorneys for Plaintiff

**APPENDIX D**

IN THE

SUPREME COURT OF THE STATE OF NEW MEXICO

RAYMOND BURNS,

*Plaintiff-Appellant,*

VS.

No. 8453

STATE OF NEW MEXICO
BUREAU OF REVENUE
INCOME TAX DIVISION
VICENTE OJINAGA,
Acting Director,

*Defendant-Appellees,*

JAMES B. HERT,

*Plantiff-Appellant,*

VS.

No. 8454

STATE OF NEW MEXICO
BUREAU OF REVENUE
VICENTE OJINAGA,
Acting Director;
INCOME TAX DIVISION

*Defendant-Appellee*

STIPULATION

IT IS HEREBY STIPULATED between the undersigned that the above-captioned appeals, both having stipulated facts which are substantially similar and both raising only questions of law concerning the power and authority of the State of New Mexico to levy an income

tax upon nonmilitary personnel employed by the federal government at White Sands Missile Range but residing in the State of Texas, may be, with the consent of the Court, consolidated for the purposes of appeal so that only one set of briefs and one oral argument is necessary for both appeals.

Dated: July 5, 1967

STEPHENSON, CAMPBELL & OLMSTED

by James B. Alley, Jr.
*Attorneys for Both Appellants*

ATTORNEY GENERAL OF THE STATE OF NEW MEXICO

by Edward R. Pearson
*Attorney for both Appellees*